IN THE

Supreme Court of the United States

October Term, 1961

No. 365

ROBERT F. NOLAN, as Administrator of the Estate of Jasper Wallace Hall, Deceased, MARJORY M. HALL, individually, and MARJORY M. HALL, as Guardian *ad Litem* of JUDITH MARIE HALL, an infant,

Petitioners,

—against—

TRANSOCEAN AIR LINES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, the Chief Justice and Associated Justices of the Supreme Court of the United States:

Robert F. Nolan, as Administrator of the Estate of Jasper Wallace Hall, deceased, and Marjory M. Hall, individually and as Guardian *ad Litem* of Judith Marie Hall, an infant, respectfully pray for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals, entered herein May 29, 1961, upon remand by this Court, 365 U. S. 293, reaffirming its previous order, 276 F. 2d 280, affirming the judgment of the United States District Court for the Southern District

of New York granting defendant's motion for summary judgment based on the statute of limitations.[1]

Basis of Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Opinions Below

The opinion of the District Court granting summary judgment is reported 173 F. Supp. 114. The original opinion of the Court of Appeals affirming the judgment of the District Court is reported in 276 F. 2d 280, and the opinion of that Court reaffirming said judgment after remand by this Court (cert. granted 363 U. S. 836, decided 365 (U. S. 293) is reported at 290 F. 2d 904.

Statement

This action was brought in the Southern District of New York for the wrongful death of Jasper W. Hall, a resident of South Carolina, who was killed in California in the crash of an airplane owned and operated by the defendant. The plaintiffs were an administrator appointed in South Carolina, the widow in her own right, and the widow as Guardian *ad Litem* of her minor child. Jurisdiction of the District Court was predicated on diversity of citizenship, the administrator being a resident of New

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[1] There are submitted with the instant petition, six copies of the petition previously filed in this action and which this Court granted, 363 U. S. 836, and nine copies of petitioners' brief previously filed in this Court. These extra copies are submitted for the convenience of the Court, should it desire to make reference to the issues and argument previously presented.

York, the widow and her minor child being residents of South Carolina and the defendant being a California Corporation. The action was predicated upon the Wrongful Death Statute of California, California Code of Civil Procedure, §377.

The defendant moved for summary judgment on the ground that the action was barred as a result of incorporation of the California period of limitations by the "borrowing" provision of the New York statute of limitations. The District Court granted the motion. Upon appeal, the Court of Appeals unanimously affirmed. Certiorari was granted by this Court, 363 U. S. 836, and the judgment of the Court of Appeals was set aside and the case remanded for reconsideration, 365 U. S. 293. Upon remand, the Court of Appeals reaffirmed its previous order affirming the judgment of the District Court.

The Pertinent Facts

The undisputed facts in this case may be summarized as follows:

1. The widow, Marjory M. Hall, was born November 17, 1936.
2. The marriage of decedent to the widow took place on December 26, 1951.
3. Judith Marie Hall, the child of the couple, was born December 2, 1952.
4. The death of decedent took place on March 20, 1953.
5. The widow reached the age of 18 on November 17, 1954, and the age of 21 on November 17, 1957.
6. The administrator was appointed on February 18, 1958.

7. The action was commenced in the District Court on November 7, 1958.

8. The widow was and is a resident of South Carolina.

9. The administrator was and is a resident of New York.

10. The defendant was and is a California corporation.

THE QUESTIONS INVOLVED

Question 1

Do applicable California decisions and the provisions of Rule 17 (b) of the Federal Rules of Civil Procedure require the Federal District Court sitting in New York to apply the law of the domicile of the petitioner-widow herein in determining the age at which the widow's disabilities of minority ceased for purposes of tolling the California Statute of Limitations as "borrowed" by Section 13 of the New York Civil Practice Act?

Question 2

Does not the construction of Section 13 of the New York Civil Practice Act by the District Court and the Court of Appeals herein abridge the petitioners' privileges and immunities as citizens of the United States in violation of Article IV, §2, of the Federal Constitution, since, as so construed, the petitioners, because of their non-residence have been given no access to the courts of New York in their own name, whereas a resident of New York, under similar circumstances, would have had such access?

Question 3

Should not this Court finally decide an issue to which the Court of Appeals admitted it did not know the answer, although said issue was previously submitted to the Court of Appeals by this Court for determination, where the issue has been vigorously contested by the parties in all courts and upon which the foreign law is not clear, particularly where important statutory rights acquired by an infant at the age of four months were taken from her before she became three years of age by the determination of the Court of Appeals thereafter made on the basis that the considered, relevant dictum of the highest court of California should not be accorded greater weight than a thirty year old decision of a lower appellate court of that state which actually misconstrued the authorities relied on in arriving at its decision?

Constitutional Provisions, Statutes, and Rules Involved

Constitution

Article IV, §2, of the Constitution of the United States of America provides:

> "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Statutes

Section 377 of the California Code of Civil Procedure provides in pertinent part as follows:

> When the death of a person . . . is caused by the wrongful act or neglect of another, his heirs or per-

sonal representatives may maintain an action for damages against the person causing the death . . . In every action under this section, such damages may be given as, under all the circumstances of the case, may be just . . . The respective rights of the heirs in any award shall be determined by the court . . .

Section 13 of the New York Civil Practice Act provides, so far as here pertinent:

Where a cause of action arises outside of this state, an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, for bringing an action upon the cause of action, except that where the cause of action originally accrued in favor of a resident of this state, the time limited by the laws of this state shall apply . . .

Section 340 of the California Code of Civil Procedure provides in pertinent part:

TIME OF COMMENCING CIVIL ACTIONS

§340. Within one year:

* * * * *

3. An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another...

Section 352 of the California Code of Civil Procedure provides insofar as relevant to this case:

If a person entitled to bring an action . . . be, at the time the cause of action accrued, either:

1. Within the age of majority; . . .

—The time of such disability is not part of the time limited for the commencement of the action.

Section 25 of the California Civil Code, as it read on March 20, 1953, provided in pertinent part as follows:

> Minors are all persons under 21 years of age; provided, that this section shall be subject to the provisions of the titles of this code on marriage and shall not be construed as repealing or limiting the provisions of Section 204 of this code; provided, further, that any female who has reached the age of 18 years and thereafter contracts a lawful marriage and thereafter reaches the age of 18 years, shall in the first instance upon contracting such marriage, and in the second instance upon reaching the age of 18 years, be of the age of majority and be deemed an adult person for the purpose of entering into any engagement or transaction respecting property or her estate, or for the purpose of entering into any contract, the same as if she was 21 years of age.

Rule

Rule 17 (b) of the Federal Rules of Civil Procedure provides in pertinent part:

> The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile . . .

The Opinions Below

The reasoning of the District Court may be summarized as follows:

1. The California Wrongful Death Statute, upon which this action is predicated, allows suit by the heirs or personal representatives (California Code of Civil Procedure, §377).

2. Section 13 of the New York Civil Practice Act requires the District Court to apply the California Statute of Limitations and "all its accouterments" including the provision tolling the statute during minority.

3. Under California law, a wrongful death action must be commenced within one year from decedent's death (California Code of Civil Procedure, §340(3)).

4. The statute of limitations is tolled during the minority of the person entitled to sue (California Code of Civil Procedure, §352).

5. However, a woman who lawfully marries prior to the age of 18 attains her majority upon reaching that age (California Civil Code, §25).

6. An action on behalf of a widow for the wrongful death of her husband must be commenced within one year after her attaining majority.

7. An action which is time-barred as to the widow is also time-barred as to infant offspring of the decedent.

8. For similar reasons, the causes of action of the administrator herein would also appear to be barred.

The District Court concluded from the foregoing that under California law, which was incorporated herein by virtue of Section 13 of the New York Civil Practice Act, all the causes of action herein were time-barred on November 17, 1955, since the widow attained her majority on November 17, 1954, when she became 18 years of age.

Upon appeal to the Court of Appeals, the petitioners herein argued that the District Court was in error in the following respects: (1) Under the conflict of laws rule of both New York and California, and also under Rule 17 (b) of the Federal Rules of Civil Procedure, the District Court should have determined the minority status of the widow by the law of her domicile, South Carolina, which extends her minority to age 21; (2) That in view of recent decisions of the California Court, California would no longer bar the action on behalf of the minor infant simply because the parent was barred, and (3) That the Court's construction of Section 13 of the New York Civil Practice Act, in effect, abridged the widow's privileges and immunities as a citizen of the United States in violation of Article IV, §2 of the Federal Constitution, in that she never had an opportunity to sue in the New York Courts in her own name by reason of her non-residence.

The Court of Appeals, in affirming, held that since there was no controlling decision in point, it felt that the better rule would be to apply the law of California, not the law of the domicile, South Carolina, as to the minority status of the widow; that the widow's privileges and immunities were not abridged since she could have sued in New York by a Guardian *ad Litem;* and that in barring the infant child the District Court "was surely right in thinking the New York courts would not refuse to follow California decisions that are directly in point simply because of other decisions of courts of the same level that are alleged to be

inconsistent with but in no way reflect on the pertinent authorities.

In setting aside the judgment of the Court of Appeals, this Court determined that although the petition raised several points decided adversely to petitioners below, only one issue would be discussed, since its determination would dispose of the case. This Court then remanded the case to the Court of Appeals to decide "what relative weights, as authoritative sources for ascertaining California law, the New York Court of Appeals would accord the *Sears-Hare* line (direct holdings of District Courts of Appeals between 1930 and 1938) and to *Leeper* (a considered, relevant dictum of general scope by the California Supreme Court in 1959)."

On the remand, the Court of Appeals reaffirmed its prior affirmance of the District Court judgment stating, ". . . we fear the only candid answer to the question the Supreme Court has put us is that we just don't know; . . ." The Court, while agreeing that the dictum in the *Leeper* case was both considered and relevant, nevertheless held that in considering this issue, it did not believe that this Court meant to exclude it from studying the degree of consideration and relevancy the New York Court of Appeals would give the issue. The *ratio decidendi* is not clear, since the Court discusses the value of dictum, the *Leeper* case in the lower California appellate court, and the public policy of California both in general and, for the most part, qualified terms.

Reasons for Granting the Writ

1. To obtain a review of two important questions of Federal law and Federal Constitutional law which, although previously presented to this Court in this

case, have not yet been, but should now be, decided by this Court.

In referring to the prior petition in this case this Court stated in its *Per Curiam* opinion, 365 U. S. 293, at 294:

> "The writ brought here several points decided adversely to petitioners below. We need discuss only one issue, for its determination disposes of the case."

As will be shown, the determination made by the Court of Appeals on remand did not dispose of the case because that Court was charged with the duty of determining only one of the several issues originally presented to this Court. Had the Court of Appeals reversed its prior affirmance of the District Court judgment, obviously the remaining issues, which it had no duty to decide on the remand, became moot. Since the Court of Appeals reaffirmed its prior affirmance on the basis of the single issue presented to it, there remain the two issues raised in petitioners' prior petition which have not as yet been determined.

In their prior petition to this Court petitioners raised three issues which they claimed the Court below erred in deciding. (1) That the law of the infant-petitioners' domicile, South Carolina, should have been applied in determining when their disabilities of minority ceased, and not the law of California. This application was commanded by Rule 17 (b) of the Federal Rules of Civil Procedure and applicable California decisions. (2) That even if California law controlled the question of when petitioners' minority ceased, recent decisions of the California Courts (even prior to the *Cooper* case) permitted remaining heirs to continue an action although one of the heirs was barred

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[2] Appendix, pp. 19-26, infra.

by reason of his contributory negligence, since the action was joint only in the sense that there could not be a series of suits by each heir. (3) That the construction of Section 13 of the New York Civil Practice Act by the Courts below abridged petitioners' privileges and immunities as citizens of the United States in violation of Article IV, ,2 of the Constitution of the United States.

The only issue that this Court discussed in its opinion, 365 U. S. 293, was the possible effect a recent decision of the California Supreme Court had on "*an* issue critical to petitioners' claim." 365 U. S. at 295 (Emphasis added). This Court then remanded the case to the Court of Appeals with the following instructions, 365 U. S. at 296:

> ". . . that court should decide what relative weights, as authoritive sources for ascertaining *California law*, the New York Court of Appeals would accord to the *Sears-Haro* line (direct holdings of District Courts Appeal between 1930 and 1938) and to *Leeper* (a considered, relevant dictum of general scope by the California Supreme Court in 1959)." (Emphasis added).

This Court, therefore, merely charged the Court of Appeals on the remand with the duty of determining the answer to only one of the three issues presented to this Court in the prior petition. That one issue was based upon the assumption that the law of California controlled in determining whether the infant-petitioners were time-barred from maintaining their action.[4] This assumption was contested by petitioners in this Court as well as in the lower Courts. While it is clear that the Court of Appeals under the remand and instructions *could have*

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[3] *Leeper* v. *Beltrami*, 53 Cal. 2d 195, 347 P. 2d 12.

[4] Petitioners' argument in the Court of Appeals was, therefore, limited to this one issue.

disposed of the case on the single issue presented to it, it is equally clear that its decision did not. It is also clear that the disposition of either of these two unresolved questions could have also disposed of this case. See *Clay v. Sun Insurance Office, Ltd.*, 363 U. S. 207. Under the decision of the Court of Appeals, the petitioners, under questions one and two herein, have been deprived of the opportunity to have these questions determined on the merits. It is, therefore, respectfully submitted that this Court review these two unanswered questions at this time.

2. The Court of Appeals has not provided an authoritative answer to an important question previously submitted to it by this Court because of that Court's admission that it did not know the answer; that this question has not been, but should now be, decided by this Court.

The answer of the Court of Appeals to the question that this Court put to it was "we just don't know."[3] Notwithstanding this candid admission, it nevertheless proceeded to make a guess of what it would think the New York Court of Appeals would think the California Supreme Court would think concerning this issue. Its guess was mainly supported by a general discount of the value of dicta in such cases as within action, and a specific discount of the dicta in the *Looper* case, the latter because:

> ". . . [W]e cannot agree the Supreme Court meant to exclude us from the same study of the degree of consideration and of relevancy which we believe the New York Court of Appeals would give; . . ."[4]

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[3] Appendix, p. 22, infra.

[4] Appendix, p. 24, infra.

Yet the New York Court of Appeals did not hesitate to give dicta its due in a proper case.[7]

It is not difficult to find statements which put little faith in the value of dicta; however, with respect to the within action, it was this Court which stated that the *Leeper* dictum was "a considered, relevant dictum of general scope by the California Supreme Court in 1959."[8] Surely this determination should not be bound by the cords of those who have in the past expressed dissatisfaction with its application for reasons which may have been justified in light of the problem before them.

The dictum in the *Leeper* case is strengthened considerably when the case of *Sears* v. *Majors*, 104 Cal. App. 60 (1930) is examined in detail. This case is the key case since those that followed later, *Haro* v. *Southern P. R. Co.*, 17 Cal. App. 2d 594 (1936), *Gates* v. *Wendling Nathan Co.*, 27 Cal. App. 2d 307 (1938), merely echo the holding of *Sears*. Since the latest view of the highest court in California, as expressed in the *Leeper* case, is diametrically opposed to the *Sears* holding it destroys the validity and authority of the *Sears* case and those that followed it, and raises a question as to whether *Sears* ever was valid, particularly in view of the fact that both the *Sears* case and the *Leeper* case cite the same authority, 2 *Wood on Limitations* (4th ed. 1916) 1079, for opposite propositions of law.

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[7] *In re Weeks' Will*, 294 N. Y. 516, rehearing denied, 294 N. Y. 979. See also *Kerfoot* v. *Kellogg*, 294 N. Y. 288, cert. den. 326 U. S. 764 (Court will follow latest relevant discussions and opinions of the highest court of foreign state on subject); *Doushkess* v. *Hamilton F. Ins. Co.*, 33 N. Y. S. 2d 248 (and will do so despite prior conflicting cases); 1 *Moore's Fed. Prac.* (2d ed. 1960) pp. 3301-3319.

[8] 365 U. S. at 296.

The Court in the *Sears* case cites four authorities[9] as purportedly supportive of its holding, 104 Cal. App. at 62-63. Of these, two, *Freeman* and *Wait*, only partially support the *Sears* holding, and the other two, *Wood* and the *American and English Encyclopedia*, not only do not support it, but are diametrically opposed to it.[10] Further-

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[9] *Freeman on Cotenancy*, Sec. 375; *Wait's Actions and Defenses*, Vol. 7, 279; 2 *Wood on Limitations*, 4th ed. p. 1079; 19 *Am. and Eng. Ency.* 182 (2d ed. 1901).

[10] In *Freeman on Cotenancy*, Sec. 375, p. 431, the rule is stated as follows:

> "A preponderance of the authorities, we think, sustains the general proposition that whenever a joint cause of action exists, and the statute of limitations is a bar to any of the plaintiffs, it is a bar to all."

However, *Freeman*, at page 432, criticizes this rule as "unjust to a minor in circumstances which do not seem to justify unusual harshness, and solely on account of an association which, on his part, is fortuitous rather than culpable." And then, at page 433, he cites and discusses a number of cases following the opposite rule.

In 7 *Wait's Actions and Defenses*, 279 (1885), the rule is given as follows:

> "As a general rule, it is only where all the plaintiffs are under disabilities, that the running of the statute is prevented . . . If one of several joint parties is capable of suing when the cause of action accrues, the statute runs against all, both at law and in equity . . . But if all the persons entitled to sue, when the joint cause of action accrues, are under a disability, the statute will not begin to run till the disability is removed from all . . ."

In 19 *Am. and Eng. Ency.* 182 (2d ed. 1901), the rule is stated as follows:

> "7. *Several Parties Jointly or Severally Interested*—a. Joint Plaintiffs—where the cause of action in several plaintiffs is joint and not several, and one of them is protected from the bar of the statute by minority or other disability, all are protected, since the immunity of one inures to the benefit of all. The rule is otherwise, however, where the cause of action is several or joint and several; in such case the immunity of one cannot effect the bar as to the others."

And in 2 *Wood on Limitations* (4th ed. 1916) 1079, the rule is stated exactly as quoted in the *Leeper* case:

> "If an action not severable is not barred as to one of the parties on account of his infancy at the time the cause of action arose, it is not barred as to either of the other parties."

more, even the two authorities that appear to support the *Sears* holding would not support a similar result in the instant case. In the *Sears* case, and in those that followed it, the widow was *not* under a disability when the husband died. In the instant action, the widow was only sixteen years of age when her husband died so that *both* she and her child were under disabilities when the cause of action accrued.[11] Both *Freeman on Cotenancy*, Sec. 376, and *Wait's Actions and Defenses*, Vol. 7, 279, state the rule to be, in effect, that, if all persons entitled to sue when the joint cause of action accrues are under the disability, the statute will not begin to run till the disability is removed from all.[12] Thus, under the circumstances of the instant case, all four authorities cited in the *Sears* case support petitioners' contention that the causes of action herein are not time-barred as to any of the petitioners, and two of these authorities would support a denial of the motion herein even if the *Sears* line of cases were still accepted as authority.

Thus whatever weight the *Sears* case ever had as a valid pronouncement of the California law on this issue has disappeared in the light of the considered, relevant dictum in the *Leeper* case.

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[11] The Court of Appeals overlooked this point when it stated in its opinion, Appendix, p. 25, infra:

> "The legislature must have known that instances in which a 'wrongful act or neglect' might cause the death of the parent of a young child were not uncommon; it is hard to see why it should have wished to allow the period of limitations in such cases to be prolonged up to a score of years, when there was in existence a person able to sue for the benefit of all . . ."

[12] *Freeman* ascribes this result to the use of the plural in particular tolling statutes. However, it would still apply in this case since, by virtue of Section 17 of the California Code of Civil Procedure, the word "person" in Section 352 can and should be read as "persons." *Wait* makes no such distinction.

Petitioners are mindful that this Court *ordinarily* accepts the interpretation of local law by the Court of Appeals,[13] where such interpretations are not disputed by the parties,[14] or are amply supported by the local law.[15] Such acceptance, however, should not preclude review by this Court where vigorously contested interpretations unsupported by local law have the effect of depriving statutory rights of infants in the face of long and well established policies underlying the theory of tolling statutes of limitations because of infancy, particularly where such interpretations were made under the shadow of the Court of Appeals' frank admission that it did not know the answer to the question it was asked to decide.[16] For these reasons the Court of Appeals' decision on the remand cannot be said to have provided an authoritative answer to the question assigned to it. It is respectfully submitted therefore, that in only this Court[17] can these infants ob-

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[13] *Byrd* v. *Blue Ridge Rural Elec. Co.*, 356 U. S. 525, 529-30; *County of Alleghany* v. *Frank Mashuda Company*, 360 U. S. 185, 191.

[14] *Byrd* v. *Blue Ridge Rural Elec. Co.*, 356 U. S. at 530.

[15] *County of Alleghany* v. *Frank Mashuda Company*, 360 U. S. at 191.

[16] It should be noted that on this particular *Looper* issue, neither the District Court nor the Court of Appeals was applying the law with which they are eminently familiar—New York. They were in fact, charged with the duty of determining foreign law—California, although it was to be determined, under the *Erie* and *Klaxon* doctrines, by initial reference to New York Law. Since the Court of Appeals stated that New York Courts had never thought about this issue, 276 F. 2d 280, Appendix, p. 20, infra, the Court below was in effect determining what *it* thought the California was on this issue.

[17] The instant action clearly magnifies the fact that *Erie* and *Klaxon* cannot provide the federal courts with the tools to enable them to properly decide all the questions presented to them in diversity cases. Cf. *Clay* v. *Sun Insurance Office, Ltd.*, 363 U. S. 207, 212; *Alleghany County* v. *Frank Mashuda Co.*, 360 U. S. 185, 189; *Meridith* v. *Winter Haven*, 320 U. S. 228, 236.

tain the final and authoritative answer to the questions raised in their petition.

It will afford the infant daughter of decedent little comfort to realize, as she eventually will, that on the basis of the words "we just don't know" the separate and independent statutory rights she acquired at the age of four months were taken from her before she reached the age of three because of the legally justified and understandable inaction of her mother, herself an infant of 16 years at the time of her husband's death. While it is undisputed that the infant daughter could not have been deprived of these rights had she sued as the sole plaintiff, the effect of the lower court's decision is to deny her these rights merely because her infant mother logically joined in the same action to have her own separate rights adjudicated with those of her daughter's. If the self-evident and universally recognized reasons underlying the theory of tolling statutes of limitations during infancy are to have any meaning, this petition should be granted and the judgment of the Court below should be reversed.

Prayer

For all of the foregoing reasons petitioners pray that this petition be granted to the end that the questions in this case may be reviewed and finally determined by this Court; that the judgment of the Court of Appeals be reversed, and that petitioners be granted such other and further relief as may be proper.

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeals on Remand

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 366—October Term, 1960.

(Submitted May 11, 1961 Decided May 29, 1961.)

(Remanded from the Supreme Court of the United States on March 24, 1961—No. 105—October Term, 1959.)

Docket No. 25779

ROBERT G. NOLAN, as Administrator of the Estate of Jasper Wallace Hall, Deceased, MARJORY M. HALL individually, and MARJORY M. HALL as guardian *ad litem* of Judith Marie Hall, an infant,

Plaintiffs-Appellants,

—v.—

TRANSOCEAN AIR LINES,

Defendant-Appellee.

Before:

LUMBARD, *Chief Judge*,
MOORE and FRIENDLY, *Circuit Judges*.

On remand from the Supreme Court of the United States. The previous order of the Court, 276 F. 2d 280,

affirming an order granting defendant summary judgment is reaffirmed.

SPEISER, QUINN & O'BRIEN (Stuart M. Speiser and Robert A. Dwyer, of Counsel), *for Appellants.*

HAIGHT, GARDNER, POOR & HAVENS (William J. Junkerman, James B. McQuillan, and Paul A. Renne, of Counsel), *for Appellee.*

FRIENDLY, *Circuit Judge*:

When this case was previously before us, 276 F. 2d 280 (2 Cir. 1960), we stated our principal task as being "to determine what the New York courts would think the California courts would think on an issue about which neither has thought." Prophecy remains the problem; but the area of perplexity has shifted from the void we then considered as presenting the principal question to ground we believed to be firmly occupied by apposite decisions of lower California courts, now called into question by the dictum of a higher one.

We recognized in our prior opinion, 276 F. 2d at 285-286, that if the minor daughter's cause of action "stood alone, neither the California nor the New York statute of limitations would be an obstacle, since both were tolled by infancy." We thought, however, that did not warrant reversal of the District Court's dismissal of this action as time-barred because of a California rule "that §377 of its Code of Civil Procedure creates a single joint cause of action for wrongful death and that if limitation has barred the action as to an adult parent, the action is also barred as to a minor infant. Sears v. Majors, 104 Cal. App. 60, 285

P. 321 (1930); Haro v. Southern Pacific R. Co., 17 Cal. App. 2d 594, 62 P. 2d 441 (1936)" to which other citations of intermediate courts of appeal could have been added.

Shortly before the argument in this Court the Supreme Court of California decided *Leeper* v. *Beltrami*, 53 Cal. 2d 195, 347 P. 2d 12 (1959), which was not called to our attention. This was understandable, for reasons that will hereafter appear. *Leeper* v. *Beltrami* was an action by Thomas Leeper and his wife, Abbie, for recovery of moneys paid under duress, starting in 1952. The husband was then serving a prison term from which he was released in 1954. The action was filed in 1956; a three-year statute of limitations for actions for relief on the ground of fraud, Code Civ. Proc. 338 4, was held to be applicable. The Supreme Court of California decided that, because of his disability, the husband's claim was not time barred. Dealing with the wife's claim, it said "If the cause of action were a joint one, the statute would be tolled as to both," citing 2 Wood on Limitations (4th ed. 1916) 1079, which had also been cited in *Sears* v. *Majors* for the contrary view; but then went on to hold the claim was not joint and the wife was time-barred. If the dictum is to be taken literally, its apparent result in wrongful death actions is the exact opposite of *Sears* v. *Majors*—the tolling of the statute as to the child's cause of action for wrongful death would save not only her own but the widow's and the administrator's as well.

The Supreme Court has directed us, 365 U. S. 293, 295-296 (1961), to "decide what relative weights, as authoritative sources for ascertaining California law, the New York Court of Appeals would accord to the *Sears-Haro* line (direct holdings of District Courts of Appeal between 1930 and 1938) and to *Leeper* (a considered, relevant dictum of general scope by the California Supreme Court in 1959)." We find the question still more difficult than that decided

on the former appeal, even with the help given by counsel's further briefs. *Sears* v. *Majors* and the other decisions of intermediate California appellate courts that followed it were not referred to by the California Supreme Court in *Looper* v. *Beltrami*. Neither did the Supreme Court of California refer in the *Looper* opinion to its own decision in *Robertson* v. *Barrell*, 110 Calif. 568, 42 Pac. 1086 (1895), on which the lower court had relied in deciding *Sears* v. *Majors*. For these and other reasons, we fear the only candid answer to the question the Supreme Court has put us is that we just don't know; we should have been happier if the Court's mandate had allowed of some procedure to permit this recently created conflict between California dictum and California decisions to be settled by the only court that can authoritatively determine it, rather than requiring us to continue two-dimensional surmise. See 1 Moore, Federal Practice (1960 ed.), pp. 2119-2121, 3332; Vestal, The Certified Question of Law, 36 Iowa L. Rev. 629 (1951).

We shall take as our frame of reference the first alternative stated by Judge Frank in *Cooper* v. *American Airlines, Inc.*, 149 F. 2d 355, 359 (2 Cir. 1945): "What would be the decision of reasonable intelligent lawyers sitting as judges of the highest New York court, and fully conversant with New York 'jurisprudence'?" The latter would not much aid the judges of the New York Court of Appeals in making a determination of California law. We know of no unique New York "jurisprudence" as to the effect to be given to dicta. *In re Weeks' Will*, 294 N. Y. 516, 522, 63 N. E. 2d 85, 87 (1945), rehearing denied, 294 N. Y. 979, 63 N. E. 2d 712 (1945), followed dicta of the highest court of Florida which "were carefully considered and deliberately made, and, in the absence of any authority from that State to the contrary." Perhaps, in a close case like this one, the Court of Appeals would be influenced by the statement of

one of its greatest members, Cardozo, has shown that it is a good deal of a mystery to me how [illegible] persons in the world, should put their faith in dicta." Cardozo, The Nature of the Judicial Process, p. 29; certainly we would be. Presumably in its task of predicting California decisions, the New York Court of Appeals would be very much interested in California's views about dicta than in its own. It would learn that although "an opinion is not to be disregarded wholly because it is obiter dictum," *In re Bleuer's Estate*, 12 Cal. App. 2d 237, 55 P. 2d 579, 580 (1936), hearing denied by Supreme Court (1936); *Dye v. Dye*, 11 Cal. App. 2d 25, 52 P. 2d 957, 959 (1935), hearing denied by Supreme Court (1936), the Supreme Court of California has stated that since language in a critical decision was unnecessary to the decision, it "may not therefore now be relied upon as authority in the present proceeding." *San Diego County v. Hammond*, 6 Cal. 2d 709, 59 P. 2d 475, 485 (1936). Moreover, one district court of appeal, dealing with dicta of intermediate appellate courts, has declared "Expressions of the given character ought not be permitted to overcome the long line of authority expressing [illegible] a contrary view" in the same courts, unless a "well and clearly persuasive reason" impels it, *Pels v. Mohr*, 126 Cal. App. 390, 14 P. 2d 878, 879 (1932). The Court of Appeals might also give weight to the words of a distinguished member of California's highest court, that it is when appellate judges "analyze issues that have been disputed every inch of the way" that "they learn to guard against premature judgment." Traynor, Some Open Questions on the Work of State Appellate Courts, 24 U. of Chi. L. Rev. 211, 224 (1957).

Appellants say we must take it to have been decided by the Supreme Court that the *Lucy* dictum was "considered, relevant [illegible] and of general scope." Generally stated the dictum plainly was, our labors over it ought

attest our regard for its relevancy, and we assume it was considered as anything said by an appellate court of standing is. But we cannot agree the Supreme Court meant to exclude us from the same study of the degree of consideration and of relevancy which we believe the New York Court of Appeals would give; if the Supreme Court had so intended, it would have reversed rather than remanded, cf. *Romero* v. *Garcia & Diaz, Inc.*, 286 F. 2d 347, 350 (2 Cir. 1961), cert. denied 365 U. S. 869 (1961).

We have already indicated the general nature of the action in *Leeper* v. *Beltrami*. In the District Court of Appeal the principal argument on limitations was whether the action was governed by the three year statute provided by California Code Civ. Proc. §338-4 for actions for fraud, or by the five year period established by §318 for the recovery of possession of real property. The District Court of Appeal held the latter, 335 P. 2d 968, 971 (1959). Not only were *Sears* v. *Majors* and its progeny not cited—the entire question of the effect of disability of one joint plaintiff on the application of the statute was not more than hinted at in the briefs if, indeed, it was that. No further contribution to the subject was made by Respondents' Petition for a Hearing in the Supreme Court or by Appellants' Reply.

Appellees urge also that there is an important distinction between the *Leeper* situation and an action for wrongful death. This is that in the *Leeper* case the wife could not have instituted a joint action while her husband was incarcerated, since Calif. Penal Code §2600 deprived him of all civil rights and California has not provided for the appointment of a guardian *ad litem* for a prisoner, whereas here the statute, Calif. Code Civ. Proc. §377, permits the personal representative *or* any heir to maintain the action, hence an administrator or, after November, 1954, four years before the bringing of this action, Hall's widow could have

begun one and joined the infant. Calif. Code Civ. Proc. §§382, 389, *Salmon* v. *Rathjens*, 152 Cal. 290, 92 Pac. 733 (1907), for whom a guardian would have been appointed, *Loock* v. *Pioneer Title Ins. & Trust Co.*, 4 Cal. App. 2d 245, 40 P. 2d 526 (1935). The authorities cited for the statement in Wood on Limitations, which on its face supports the *Cooper* dictum rather than the *Sears* decision, are said to be inapplicable to California wrongful death actions on that account. Cf. *Moore* v. *Capps*, 9 Ill. 315 (1847).

To all this must be added the policy embodied in the California legislature's selecting so short a period of limitations as one year for actions for personal injuries or wrongful death, Code Civ. Proc. §340-3, a period also prescribed for such typically short-lived torts as libel, slander, assault, battery and false imprisonment, as well as seduction of a person below the age of legal consent. The legislature must have known that instances in which a "wrongful act or neglect" might cause the death of the parent of a young child were not uncommon; it is hard to see why it should have wished to allow the period of limitations in such cases to be prolonged up to a score of years, when there was in existence a person able to sue for the benefit of all and the award is a unitary sum in which "The respective rights of the heirs * * * shall be determined by the court." Code Civ. Proc. §377. True, exactly such a prolongation of the period would occur when an infant is injured, even though the infant had a parent who might have been appointed as guardian *ad litem*, *Scott* v. *McPheeters*, 33 Cal. App. 2d 629, 92 P. 2d 678 (1939), hearing denied, 93 P. 2d 562 (1939); but there the claim is solely the infant's and the statute is too clear to raise any question for construction. It has been suggested that "Where there are multiple claimants and one or more but not all are subject to some incapacity, the results should depend on the na-

ture of the cause of action." Developments-Statutes of Limitations, 63 Harv. L. Rev. 1177, 1230 (1950). Here, any one of the joint claimants could sue and have those under a disability named as defendants, with their rights in the single award to be determined by the court, and there would rarely be a case where the personal representative or adult heirs would have an interest adverse to the infant's that would cause him or them to refrain from suit. Where the case for starting the running of the statute is so strong and the consequences of an opposite rule so contrary to apparent legislative policy, we cannot believe the Supreme Court of California meant to overturn, without citation, an unbroken line of decisions of intermediate appellate courts, of thirty years' standing, consistent with that policy.[1] Since we cannot believe this, we equally cannot believe the New York Court of Appeals could believe it.

We therefore adhere to our affirmance of the order of the District Court granting defendant's motion for summary judgment.

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[1] In both *Sears* and *Haro*, hearing was denied by the Supreme Court of California. That court "ordinarily grants a petition if a majority concludes that justice demands it," even if the question of law is not novel or important. Traynor, Some Open Questions on the Work of State Appellate Courts, 24 U. of Chi. L. Rev. 211, 214 (1957)—*a fortiori*, we should suppose, when it is. We are told also that "The Supreme Court is willing to have the district courts make a good deal of new law, so long as it is in accord with the former's idea of what the law should be," and that a survey shows hearing is granted primarily in cases where the Supreme Court modifies either the result or the reasoning below. To Hear or Not to Hear: A Question for the California Supreme Court, 3 Stanford L. Rev. 243, 247 (1951). The California Supreme Court itself has said that "The order of this court denying a petition for a transfer * * * after * * * decision of the District Court of Appeal may be taken as an approval of the conclusion there reached, but not necessarily of all of the reasoning contained in that opinion." *Eisenberg* v. *Superior Court*, 193 Cal. 575, 578, 226 P. 617, 618 (1924); see also *Cole* v. *Rush*, 45 Cal. 2d 345, 350, 289 P. 2d 450, 453 (1955).

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of May one thousand nine hundred and sixty-one.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
Circuit Judges.

ROBERT F. NOLAN, as Administrator of the Estate of Jasper Wallace Hall, Deceased, MARJORY M. HALL, individually, and MARJORY M. HALL, as Guardian *ad Litem* of Judith Marie Hall, an infant,

Plaintiffs-Appellants,

—v.—

TRANSOCEAN AIR LINES,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk

By Niall F. O'Doherty
Chief Deputy Clerk